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Supreme Court, U.S.
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No. 99-1642

In The

Supreme Court of the United States

THEODORE B. GOULD,

Petitioner,

vs.

FRED STANTON SMITH, HERBERT STETTIN, P.A., and THE BANK OF NEW YORK,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals and district court erred in affirming a bankruptcy court order denying and dismissing various counterclaims, crossclaims, and proposed third-party claims by Petitioner, based on Petitioner's refusal to comply with previously entered and final contempt and sanctions orders?

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STATEMENT OF JURISDICTION

The Petitioner asserts that jurisdiction exists under 28 U.S.C. § 1254(1). No jurisdiction exists, however, as the Petitioner has failed to claim or prove the existence of any constitutional issue, important and unsettled question of federal law, or conflict among the circuit courts of appeal. Sup. Ct. R. 10.1(a) through (c); *Braxton v. United States*, 500 U.S. 344, 347-48 (1991).

STATEMENT OF THE CASE

Introduction

This case is the sixteenth attempt in this Court by the debtors in the consolidated bankruptcy proceeding – commenced voluntarily by the debtors in 1984 – to delay and disrupt the closing of the cases.[1]

The debtors have commenced and prosecuted, unsuccessfully in each instance, approximately 48 appeals to the court of appeals, and approximately twice as many

[1] Two additional petitions were filed by Mr. Gould on the same date as the petition here (Case Numbers 99-1643, 99-1644). Of the 15 previous petitions to this Court, 14 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed. *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court. The bankruptcy cases were finally closed in September, 1998.

appeals in the district court, in the fourteen years since a creditors' plan of reorganization was confirmed. For his serial, collateral attacks, the debtor/Petitioner has been sanctioned on several occasions. The present Petition is also frivolous.[2]

The Nature of the Case Below

This is the third level of review. Petitioner seeks review of an order of the court of appeals affirming a district court's affirmance of a bankruptcy court order. The bankruptcy court's order below granted the Trustee's motions (a) to dismiss with prejudice a number of claims by Petitioner after he refused to comply with previously-entered, final, contempt orders, and (b) to dismiss voluntarily the Trustee's remaining claims against Petitioner, without prejudice, so that the bankruptcy cases could be closed.

Course of the Proceedings

The underlying bankruptcies began in August, 1984. Petitioner and four entities controlled by him filed voluntary petitions under Chapter 11.

Respondent, The Bank of New York ("Bank") – the largest creditor (approximately $200 million) of the five debtors – filed an amended plan of reorganization

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[2] The debtor/Petitioner has been held in contempt and sanctioned repeatedly for attempting to relitigate previously decided issues, and for attempts to circumvent bankruptcy court rulings.

("Plan") which was approved by the creditors and the bankruptcy court in 1985.

The Plan provided for a Liquidating Trust as the vehicle for the marshaling of assets and payment of claims. Respondent Fred Stanton Smith, Liquidating Trustee ("Trustee"), was appointed by the bankruptcy court in 1985 to administer the Trust.

Other than a novel bankruptcy and federal tax issue reviewed by this Court in 1992[3] and over 100 appeals pursued by Petitioner, the collection of assets and payment of creditors was unremarkable.

As part of his refusal to comply with the Plan, Petitioner caused subsidiaries of a debtor to sue the Trustee and the Bank in Virginia. The Florida bankruptcy court held that this attempt to circumvent the Florida bankruptcies was contemptuous. The district court and the court of appeals affirmed. *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

On another occasion, Petitioner and his counsel were again held in contempt for filing frivolous and repetitive pleadings regarding previously-adjudicated claims.[4]

In 1994, the bankruptcy court entered another sanctions order against Petitioner, his co-debtors, and his Virginia attorney for asserting frivolous and repetitive claims against the Trustee. [Petitioner's App. 9.]

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[3] *Holywell Corp. v. Smith*, 503 U.S. 47 (1992).

[4] In 1997, Petitioner filed a motion under Federal Rule of Civil Procedure 60(b) to vacate the contempt order. The bankruptcy court denied the motion. Petitioner appealed to the district court and the court of appeals, each of which affirmed.

Petitioner has also been held in contempt for selling property of the Liquidating Trust and refusing to turn over the proceeds to the Trustee. The United States holds an unsatisfied judgment of over $1.3 million against Petitioner for those actions. Petitioner has not paid the sanctions, though they are final and non-appealable.

The Trustee commenced an adversary proceeding in the bankruptcy court in 1995 to determine the rights and obligations of the Miami Center Liquidating Trust regarding Petitioner's partnership interest in the Miami Center Joint Venture ("MCJV"). The Trustee alleged that Petitioner had circumvented a bankruptcy court order and settlement agreement by arranging "loans" from his joint venture partner that were actually distributions of his equity. Petitioner counterclaimed against the Trustee, crossclaimed against the Bank,[5] and sought leave to join as additional third-party defendants: (a) the Trustee's attorney and law firm, and (b) the Trustee's accountants.

Petitioner's partner in MCJV, Olympia & York Florida Equity Corporation ("O&Y"), commenced its own bankruptcy in New York City in 1996. Ultimately, the Trustee obtained a settlement with O&Y and that settlement was approved by the New York bankruptcy court. Based on a business and legal assessment that the remaining claims

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[5] Certain of Petitioner's characterizations of previous opinions are misleading. For example, he asserts that the Bankruptcy Judge held that the dismissed crossclaims were "colorable" and that the Trustee unjustifiably refused to pursue them. The quoted portions of those opinions show that the judge was merely stating that colorability was the test for whether there was an unjustifiable refusal.

against Petitioner were not worth the cost and delay of further prosecution (particularly in light of the $1.3 million unsatisfied contempt judgment held by the United States), the Trustee then moved to voluntarily dismiss without prejudice those claims.

In addition, the Trustee and the Bank jointly moved the bankruptcy court to deny Petitioner's motion to add additional third-party defendants and to dismiss with prejudice Petitioner's counterclaims, crossclaims, and proposed third-party claims. The Trustee and the Bank then moved for and obtained the entry of a final decree in the five consolidated bankruptcy cases so that they could be closed.

The bankruptcy court granted the motions for dismissal, and Petitioner appealed. The district court affirmed in an order entered March 5, 1999. [Petitioner's App. 14.] Petitioner then moved the district court to vacate or amend that order and to permit a further hearing on the matters raised by the motion. Both motions were denied on April 2, 1999. Petitioner next appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court. [Petitioner's App. 1.] This petition for certiorari followed.

The only material facts in the record here are not in dispute. The contempt orders and sanctions order were entered and unsuccessfully appealed; Petitioner refused to comply with the requirements of the contempt and sanctions orders; Petitioner's claims had already been asserted and denied numerous times before, and the

bankruptcy court dismissed Petitioner's claims as a result.

SUMMARY OF ARGUMENT

The bankruptcy court, district court, and court of appeals committed no error. Petitioner, though a non-lawyer, must comply with court orders if he wishes to prosecute his claims and appeals. His right to self-representation is not a license to disregard court orders, to refuse to pay court-ordered sanctions, and to endlessly reassert previously-adjudicated arguments. The right to self-representation, like any other right, may be waived if abused.

ARGUMENT

I. Self-Representation

Petitioner's self-representation argument was lost years ago when he unsuccessfully appealed the bankruptcy court's certification of contempt. That order required, "that an attorney admitted to practice before the United States District Court for the Southern District of Florida and the United States Bankruptcy Court be required to sign all further pleadings filed for or on behalf of Theodore B. Gould," because Gould had continually attempted to raise issues on a serial basis. [Petitioner's App. 3.]

That final order may not now be collaterally attacked here. Petitioner failed to comply with that order, failed to

pay the contempt judgment entered by a district judge, and failed to pay a further sanctions award to the Trustee ordered by the bankruptcy court in 1994.

Petitioner has not cited any case[6]– because no such case exists – for the proposition that a *pro se* litigant may prosecute claims while in violation of court orders such as these. The latitude, patience, and deference accorded to *pro se* parties is enormous, but not limitless.

Pro se parties may be sanctioned under Federal Rule of Bankruptcy Procedure 9011, and they have the same duties under that rule as an attorney. *In re Weiss*, 111 F.3d 1159, 1169 (4th Cir. 1997). Bankruptcy courts also have inherent power, as do other federal courts, to punish bad faith conduct amounting to the abuse of the litigation process. *In re Graffy*, 233 B.R. 894, 898 (Bankr. M.D. Fla. 1999) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123 (1991)).

Courts have repeatedly addressed the issue of, "attempting to stem the filing and litigating of patently frivolous lawsuits by overly litigious *pro se* litigators", in cases such as *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986), and *Traylor v. City of Atlanta*, 805 F.2d 1420 (11th

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[6] Indeed, Petitioner's largely irrelevant citations are to cases involving whether a criminal defendant invoked the right to self-representation. Some directly contradict Petitioner's position. [Petition at 21 (citing *DeNardo v. Murphy*, 781 F.2d 1345, 1348 (9th Cir. 1986) ("Although litigiousness alone is no reason to enjoin future litigation, a frivolous claim by a litigious plaintiff may be extremely costly to defendants and can waste valuable court time.") (citation omitted) (affirming an injunction against future litigation), *cert. denied*, 476 U.S. 1111 (1966))].

Cir. 1986). Trial courts have, "considerable discretion in restricting the filings of such a litigator." *Traylor*, 805 F.2d at 1421. Petitioner was not foreclosed from any access to the bankruptcy court;[7] he simply had to comply with the contempt and sanctions orders, and to retain counsel as directed *or* to demonstrate why he should be relieved of that requirement. Petitioner failed or refused to do any of those things.

The district court correctly held that the right to self-representation may be lost by a litigant engaging in abusive or disruptive behavior. [Petitioner's App. 15 n. 1 (citing *United States v. Dougherty*, 473 F.2d 1113, 1124 (D.C. Cir. 1972)).]

II. Bankruptcy Court Jurisdiction

Petitioner claims that the bankruptcy court lacked jurisdiction. This issue was not raised by Petitioner in the court of appeals, and thus is not addressed in the opinion below. It has, however, been repeatedly raised by Petitioner in other appeals too numerous to list here.

Petitioner takes the peculiar position that the bankruptcy court lacked jurisdiction to dismiss his counterclaims and crossclaims, which he filed in the bankruptcy court. If that court lacked jurisdiction, however, then it would have had to dismiss the claims for lack of subject matter jurisdiction and the result would be the same.

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[7] Petitioner was allowed to appear in both the bankruptcy court and the district court to argue why he should not be required to comply with the prior contempt and sanctions orders.

The court of appeals rightly pointed out that the bankruptcy court had jurisdiction pursuant to the terms of the plan of reorganization, 28 U.S.C. § 157(b)(1), and 11 U.S.C. § 1142(b). [Petitioner's App. 11-13.] The Liquidating Trust was created to liquidate the assets of the consolidated bankruptcy estates. The lawsuit in question concerned the Liquidating Trustee, the professionals of the Trustee who were hired to assist in the liquidation, the only remaining creditor, and the debtor/Petitioner. The claims raised by the Petitioner were collateral attacks on the plan of reorganization itself. Nevertheless, the Petitioner takes the position that the bankruptcy court had no jurisdiction to hear any matters once the plan was confirmed. There is simply no support for this argument.[8]

The Petitioner himself affirmatively invoked the bankruptcy court's jurisdiction (as he has in the past) by seeking permission to bring his counterclaims and cross-claims. By affirmatively invoking the bankruptcy court's jurisdiction over such matters, the Petitioner has waived any complaint about the bankruptcy court exercising such jurisdiction.

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[8] The cases cited by Petitioner are not helpful to his position. For example, in *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), the plan was being invoked to establish bankruptcy court jurisdiction over a products liability suit brought four and a half years after the bankruptcy case closed by a consumer against the entity that purchased assets from the estate. The connection to the bankruptcy case there was too tenuous; it was not a case by or against a debtor, and the outcome did not affect distribution. Here, however, suit was brought by the debtor/Petitioner in order to claim assets of the Liquidating Trust, the purpose of which was to liquidate the assets of the estate for distribution to creditors of the estate.

When a party files a noncore adversary proceeding in the bankruptcy court, it loses its ability to later object to the jurisdiction of the bankruptcy court. *Mann v. Alexander Dawson Inc. (In re Mann)*, 907 F.2d 923, 926 (9th Cir. 1990).

III. Trustee's Dismissal

Federal Rule of Bankruptcy Procedure 7041 (adopting Federal Rule of Civil Procedure 41) allows any party to dismiss its claims without prejudice. That rule also provides that, if there is a counterclaim, there may be no dismissal without prejudice unless the counterclaim may remain pending for independent adjudication. This rule serves to prevent a plaintiff from divesting a district court of jurisdiction in non-diverse cases by voluntarily dismissing the plaintiff's federal cause of action. *See, e.g., American Fin. Sys. Inc. v. Harlow*, 65 F.R.D. 94 (D. Md. 1974) (discussing the purpose and application of the rule). In this case, the bankruptcy court had jurisdiction over these core matters pursuant to 28 U.S.C. § 157(b)(2). Petitioner affirmatively invoked that jurisdiction by bringing his counterclaims and crossclaims. The counterclaims thus could have remained pending, had they been legally sufficient.

Petitioner misconstrues Rule 41(a)(2) and mistakenly argues that his counterclaims can never be determined adversely to him if they are to, "remain pending." This is an absurd reading unsupported by the case law. Invalid counterclaims will not prevent a voluntary dismissal without prejudice. *Abdulaziz v. Metropolitan Dade County*, 741 F.2d 1328, 1332 (11th Cir. 1984) (counterclaim invalid

because plaintiff immune from suit); *Sams v. Beech Aircraft Corp.*, 625 F.2d 273, 277 (9th Cir. 1980); *Debruyn Produce Co. v. Sobiech*, Case No. 91 Civ. 7995, 1992 U.S. Dist. LEXIS 9744, at *13-14 (S.D.N.Y. June 30, 1992) (counterclaim that failed to state a claim will not prevent dismissal). Furthermore, because Petitioner's counterclaim was dismissed by the bankruptcy court in the same order, that counterclaim did not exist and could not serve as a basis for opposing the voluntary dismissal. *SEC v. Lorin*, 869 F.Supp. 1117, 1119 (S.D.N.Y. 1994) (dismissed counterclaims no bar to a voluntary dismissal).

Petitioner's counterclaims and crossclaims were barred by the doctrines of claim and issue preclusion, the statute of limitations, and by Petitioner's failure to comply with contempt orders. [Petitioner's App. 15-17.] Petitioner does not challenge those findings. Therefore, certiorari would be futile as the claims are barred even if all of the relief sought by the Petitioner were granted.

CONCLUSION

None of the appropriate grounds for certiorari are present. The three lower courts correctly and unanimously ruled that Petitioner's claims are barred, that the bankruptcy court had jurisdiction, and that the bankruptcy court properly exercised its discretion in denying the motion to amend, granting the Trustee's motion to voluntarily dismiss his claims, granting the Respondents' joint motion for dismissal with prejudice of Petitioner's claims, and closing the cases.

For all these reasons, it is respectfully submitted that the writ should be denied.

Respectfully submitted,

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